

Chan Kok Ming v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL
NO A-05–201–06 OF 2023
HADHARIAH ISMAIL, AZMAN ABDULLAH AND AZMI
ARIFFIN JJCA
7 DECEMBER 2023

Criminal Procedure — Criminal revision — Review of lower court's order — High Court ('HC') on prosecution's revision application set aside lower court's order allowing release of accused's international passport to him for four days to attend business engagement in Singapore — Trial court had earlier granted accused bail on condition he surrendered passport to court — Accused was 'feng shui' exponent whose skills were required by Singapore client — Whether on peculiar facts of case, HC erred in refusing release of passport to accused — Whether accused had shown valid reason for going to Singapore — Whether HC should have struck balance between risk of accused absconding trial and his fundamental right under Federal Constitution to be free to move to earn a living — Whether on the facts, preventing accused from leaving Malaysia was unfair to him

The appellant was charged in the sessions court with making false claims amounting to RM481,417.50 in respect of goods and services tax refunds. He was granted bail in the sum of RM20,000 on condition he surrendered his international passport to the court and also reported monthly to the Customs Department. Whilst the trial was still at the prosecution stage, the appellant applied for, and was granted, the release of his international passport for three days from 14–17 July 2023 to allow him to travel to Singapore to handle his business affairs ('the trial court's order'). The appellant was apparently a 'feng shui' exponent and was engaged by a client in Singapore to perform some work there using his 'feng shui' expertise. The respondent, however, successfully applied to the High Court ('HC') by way of criminal revision to set aside the trial court's order. The HC held that in view of the seriousness of the offence the appellant was charged with and the risk that he might abscond, the decision to return the international passport to the appellant was wrong. The court held that there was insufficient documentary evidence to support the application for release of the passport and that the application was also not urgent. The HC took the view that the appellant did not have to physically go to Singapore but could communicate with his Singapore client using the various modern-day electronic means available for that purpose. When the appellant filed the instant appeal against the HC's decision, the respondent objected by saying that it was both incompetent and academic — 'incompetent' because the HC's

- A decision was not an appealable one under s 3 of the Courts of Judicature Act 1964 since it did not finally dispose of the rights of the parties, and ‘academic’ because the dates for which the release of the passport was sought had already long past by the time the instant appeal came up for hearing.
- B **Held**, unanimously allowing the appeal, setting aside the High Court’s decision and requiring the appellant to submit to the trial court on or before 30 October 2023, supporting documents such as his flight itinerary or particulars of accommodation if he wanted his international passport to be released to him on that date to enable him to go to Singapore from 1–5 November 2023 and to ensure that the passport was returned to the trial court on or before 10 November 2023:
- C
- D (1) The HC judge had not given sufficient judicial appreciation when he exercised his revisionary jurisdiction. He had failed to sufficiently consider the significance of the appellant’s business in ‘feng shui’. As an expert in that area, the appellant had to be present on-site to survey, visualise, gather external surrounding information for a better engagement and to render advice, analysis, recommendations and to avoid any pitfalls as much as possible. Engagement in meeting with clients was vital in order to lay out strategic and development plan in bringing successful positive outcome for the clients (see paras 22 & 28).
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- F (2) The court took note of the fact that the appellant had never failed to appear in court for his ongoing criminal trial (see para 23).
- G (3) Although the initial order sought by the appellant had become stale, he had again sought temporary release of his passport to travel to Singapore from 1–5 November 2023 on a business trip. In exercising its discretion to grant the request, the court had to strike a balance between the risk of the appellant absconding from his ongoing trial and his fundamental right under the Federal Constitution to freedom of movement, liberty and the presumption of innocence. Each case had to be decided on its own merits (see paras 23–25).
- H (4) Being a ‘feng shui’ expert who depended on his skill in that area for his livelihood, the appellant had a business duty to perform, but those duties should not clash with the duty of the court to proceed with the trial. To bar the appellant from leaving the country, when he had shown to this court valid and legitimate reason to be in Singapore for a ‘feng shui’ business engagement was unfair to him. The ends of justice would not be met by preventing the appellant from leaving Malaysia at this stage. In addition, the appellant had not shown any evidence that he would be a ‘flight risk’ if he was out of the court’s jurisdiction (see para 27).
- I

[Bahasa Malaysia summary]

Perayu didakwa di mahkamah sesyen dengan membuat tuntutan palsu berjumlah RM481,417.50 berhubung pembayaran balik cukai barang dan perkhidmatan. Beliau dibenarkan ikat jamin dengan jumlah RM20,000 dengan syarat beliau menyerahkan pasport antarabangsanya kepada mahkamah dan juga melaporkan setiap bulan kepada Jabatan Kastam. Semasa perbicaraan masih di peringkat pendakwaan, perayu memohon, dan telah dibenarkan, pelepasan pasport antarabangsanya selama tiga hari dari 14–17 Julai 2023 untuk membolehkannya pergi ke Singapura untuk mengendalikan urusan perniagaannya ('perintah mahkamah perbicaraan'). Perayu sebenarnya seorang ahli 'feng shui' dan telah dilantik oleh seorang pelanggan di Singapura untuk melaksanakan beberapa kerja di sana menggunakan kepakaran 'feng shui'nya. Responden, bagaimanapun, berjaya memohon kepada Mahkamah Tinggi ('MT') melalui semakan jenayah untuk mengetepikan perintah mahkamah perbicaraan. HC memutuskan bahawa memandangkan keseriusan kesalahan yang didakwa oleh perayu dan risiko beliau mungkin melarikan diri, keputusan untuk memulangkan pasport antarabangsa kepada perayu adalah salah. Mahkamah memutuskan bahawa tiada keterangan dokumen yang mencukupi untuk menyokong permohonan pelepasan pasport dan permohonan tersebut juga tidak mustahak. MT mengambil pandangan bahawa perayu tidak perlu pergi ke Singapura secara fizikal tetapi boleh berkomunikasi dengan anakguam Singapuranya menggunakan pelbagai cara elektronik moden yang ada untuk tujuan tersebut. Apabila perayu memfailkan rayuan semasa terhadap keputusan MT, responden membantah dengan mengatakan bahawa ia adalah tidak kompeten dan akademik — 'tidak kompeten' kerana keputusan MT tidak boleh dirayu di bawah s 3 Akta Mahkamah Kehakiman 1964 kerana ia tidak akhirnya melupuskan hak pihak-pihak, dan 'akademik' kerana tarikh pelepasan pasport tersebut telah lama berlalu pada masa rayuan semasa ditetapkan untuk pendengaran.

Diputuskan, sebulat suara membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi dan menghendaki perayu menyerahkan kepada mahkamah perbicaraan pada atau sebelum 30 Oktober 2023, dokumen sokongan seperti jadual perjalanan penerbangannya atau butir-butir penginapan jika beliau mahu pasport antarabangsanya dilepaskan kepadanya pada tarikh tersebut untuk membolehkannya pergi ke Singapura dari 1–5 November 2023 dan memastikan pasport dikembalikan ke mahkamah perbicaraan pada atau sebelum 10 November 2023:

- (1) Hakim MT tidak memberikan penilaian kehakiman yang mencukupi semasa beliau menjalankan bidang kuasa semakannya. Beliau telah gagal untuk mempertimbangkan secukupnya kepentingan perniagaan perayu dalam 'feng shui'. Sebagai pakar dalam bidang tersebut, perayu perlu hadir di tapak untuk meninjau, memvisualisasikan, mengumpul

- A maklumat sekeliling luaran untuk penglibatan yang lebih baik dan untuk memberikan nasihat, analisis, pengesyoran dan untuk mengelakkan sebarang kesulitan sebanyak mungkin. Penglibatan dalam pertemuan dengan pelanggan adalah penting untuk menyusun pelan strategik dan pembangunan dalam membawa hasil positif yang berjaya untuk pelanggan (lihat perenggan 22 & 28).
- B (2) Mahkamah mengambil perhatian tentang fakta bahawa perayu tidak pernah gagal hadir ke mahkamah untuk perbicaraan jenayahnya yang sedang berjalan (lihat perenggan 23).
- C (3) Walaupun perintah awal yang diminta oleh perayu telah menjadi lapuk, beliau sekali lagi memohon pelepasan sementara pasportnya untuk pergi ke Singapura dari 1–5 November 2023 dalam perjalanan perniagaan. Dalam menggunakan budi bicaranya untuk membenarkan permohonan tersebut, mahkamah perlu mengimbangi antara risiko perayu melarikan diri daripada perbicaraan yang sedang berjalan dan hak asasinya di bawah Perlembagaan Persekutuan untuk kebebasan bergerak, kebebasan diri dan anggapan tidak bersalah. Setiap kes perlu diputuskan mengikut meritnya sendiri (lihat perenggan 23–25).
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- E (4) Sebagai seorang pakar ‘feng shui’ yang bergantung kepada kemahirannya dalam bidang tersebut untuk mata pencariannya, perayu mempunyai tugas perniagaan untuk dilaksanakan, tetapi tugas tersebut tidak seharusnya bercanggah dengan tugas mahkamah untuk meneruskan perbicaraan. Untuk menghalang perayu daripada meninggalkan negara, apabila beliau telah menunjukkan kepada mahkamah ini alasan yang sah dan sahih untuk berada di Singapura untuk urusan perniagaan ‘feng shui’ adalah tidak adil baginya. Pengakhiran keadilan tidak akan tercapai dengan menghalang perayu daripada meninggalkan Malaysia pada peringkat ini. Di samping itu, perayu tidak menunjukkan sebarang keterangan bahawa beliau akan menjadi ‘risiko penerbangan’ jika beliau berada di luar bidang kuasa mahkamah (lihat perenggan 27).]
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Cases referred to

- H *Ahmad Zubair @ Ahmad Zubir bin Hj Murshid v PP* [2014] 6 MLJ 831; [2014] 9 CLJ 289, CA (folld)
Dato’ Seri Anwar bin Ibrahim v PP [1999] 1 MLJ 321; [1999] 1 CLJ 537, CA (folld)
Lee Kwan Woh v PP [2009] 5 MLJ 301; [2009] 5 CLJ 631, FC (refd)
- I *Mohamad Ridzuan bin Zamhor lwn Pendakwa Raya* [2018] 6 MLJ 606; [2018] 4 CLJ 315; [2018] 2 AMR 17, CA (folld)
Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd [2003] 2 MLJ 495; [2003] 2 CLJ 177, CA (folld)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 50
Criminal Procedure Code s 323
Federal Constitution
Goods and Services Tax Act 2014 s 89(1)(b)

A

B

Appeal from: Criminal Revision No AA-43–3–04 of 2023 (High Court, Ipoh)

Amrick Singh Sandhu (with Sandeep Singh a/l Jit Singh) (Naran Singh & Co) for the appellant.

Ng Siew Wee (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

C

Azmi Ariffin JCA:**INTRODUCTION**

D

[1] The appellant was charged at the Ipoh Sessions Court for filing false claims on good and services tax refunds amounting to RM481,417.50 under s 89(1)(b) of the Goods and Services Tax Act 2014.

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[2] The appellant has been released on bail and the criminal charges that have been brought against him are currently being heard before the Ipoh Sessions judge. As at 8 September 2023, the trial is still at the prosecution stage and 48 prosecution witnesses had testified in the trial. Bail was allowed in the sum of RM20,000 with one surety subject to the following conditions:

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- (a) the applicant international passport to be surrendered to the court; and
- (b) the applicant is to report to the Royal Malaysian Customs Department on a monthly basis.

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[3] On 28 March 2023, the appellant filed an application at the Ipoh Sessions Court (Miscellaneous Criminal Application No AA-64–12–08 of 2022) for temporary release of his international passport from 14–17 July 2023 so that he could travel to Singapore to handle his business affairs.

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[4] On 27 April 2023, the learned sessions court judge allowed the appellant's application and ordered that the passport be returned on or before 27 July 2023.

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[5] On the same day, the prosecution via their letter dated 27 April 2023 made an application for revision under s 323 of the Criminal Procedure Code against the decision of the Ipoh Sessions Court judge in granting the appellant's

A application for temporary release of his international passport, to the Ipoh High Court.

B [6] On 29 May 2023, the learned High Court judge allowed the prosecution's application for review and set aside the decision of the learned sessions court judge.

[7] Aggrieved, on 8 July 2023 via encl 1, the appellant filed an appeal to the Court of Appeal.

C THE HIGH COURT'S DECISION

[8] The learned High Court judge in his grounds of judgment, which we now reproduce, had this to say:

D [17] Pertuduhan terhadap responden adalah berikutan tindakan responden memperguna 60 orang orang kena cukai ('OKC') untuk membuat pernyataan atau catatan palsu berhubung cukai input dengan niat untuk memperoleh kredit atau tuntutan balik bagi cukai. Pertuduhan terhadap responden adalah serius kerana jika sabit kesalahan membawa hukuman penjara maksimum lima tahun atau denda sehingga 20 kali ganda daripada amaun cukai atau kedua-duanya, jika sabit kesalahan.

E [18] Mahkamah ini telah memberi pertimbangan bahawa pertuduhan yang melibatkan responden berada di peringkat kes pendakwaan sambung perbicaraan. Dalam keadaan responden sedang mempunyai kes sambung perbicaraan di mana 30 orang saksi telah dipanggil memberi keterangan yang mana mahkamah ini berpendapat bahawa hak responden yang telah disekat oleh mahkamah sesyen untuk menghadiri urusan perniagaan di Singapura perlulah dipertahankan. Tidak boleh dinafikan bahawa pertuduhan jenayah terhadap responden adalah merupakan salah satu kes yang melibatkan kepentingan awam kerana ianya melibatkan hasil negara yang secara tidak langsung menjejaskan kesejahteraan rakyat.

G [19] Terdapat beberapa keputusan oleh Mahkamah Rayuan dan Mahkamah Persekutuan berhubung permohonan pelepasan sementara pasport tertuduh untuk tujuan ke luar negara sama ada bagi tujuan urusan ibadat dan rawatan di luar negara melibatkan individu yang didakwa bagi kes berprofil tinggi dan berkepentingan awam. Mahkamah telah menolak permohonan pelepas sementara pasport bagi kes-kes berikut:

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- I (i) *Public Prosecutor v Dato' Seri Dr Ahmad Zahid Hamidi*, (Mahkamah Rayuan Jenayah No W-05-226-05/2019 dan Mahkamah Persekutuan Rayuan Jenayah No W-0S(L)-124-05/2019), permohonan pasport untuk mengerjakan umrah di Mekah.
- (ii) *Public Prosecutor v Tengku Adnan Tengku Mansor* (Mahkamah Rayuan Rayuan Jenayah No W-05-68-02/2019; Mahkamah Tinggi — *Tengku Adnan bin Tengku Mansor v Pendakwa Raya* [2019] MLJU 658), permohonan pasport untuk mendaftar anak di Universiti di Indonesia.

[20] Peguam terpelajar responden menegaskan bahawa responden sebenarnya mempunyai 'deserving grounds' untuk ke Singapura bagi tujuan urusan perniagaan. Tiada sebab untuk pihak pemohon membantah sedangkan ianya telah dibenarkan untuk kes-kes lain yang secara jelas menunjukkan pertuduhan yang lebih serius dari kes responden. Selain daripada itu, responden adalah merupakan seorang 'sifu feng shui' yang memiliki kepakaran dan pengetahuan peribadi dalam perniagaan beliau. Responden harus hadir secara sendiri ke tempat atau premis di mana khidmat 'feng shui' beliau diperlukan bagi menilai elemen-elemen 'feng shui' sebelum dapat memberikan nasihat.

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[21] Mahkamah berpendapat bahawa permohonan tersebut tidak disokong dengan bukti yang kukuh. Responden gagal menunjukkan terdapat keperluan mendesak untuk menghadiri urusan perniagaan yang penting di Singapura. Walaupun terdapat surat yang dieskibitkan untuk menunjukkan bahawa pelawaan oleh syarikat di Singapura, namun ianya bukanlah satu kecemasan atau keperluan yang mendesak untuk responden ke Singapura dan berurusan dengan syarikat di Singapura. Responden sepatutnya telah sedia maklum bahawa pasportnya ditahan di mahkamah kerana mempunyai pertuduhan jenayah yang serius dan berat. Peluang perniagaan yang dijalankan oleh syarikat Responden masih ada dan boleh dibuat di dalam negara.

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[22] Di zaman yang serba moden dan berteknologi tinggi ini, kehadiran secara fizikal untuk menjalankan urusan perniagaan bukanlah satu keperluan yang mendesak. Ianya boleh dibuat secara berkomunikasi melalui emel yang boleh disertakan dengan gambar-gambar, talipon bimbit (whatapps) dan secara 'video call' yang boleh menjimatkan masa dan kewangan.

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[23] Di samping itu, hak responden untuk mendapatkan pasport yang telah diperintahkan untuk diserahkan kepada mahkamah bukan merupakan hak mutlak responden. Responden tidak boleh diberikan kelonggaran untuk mendapatkan semula pasport dengan sewenang-wenangnya atas urusan perniagaan yang boleh dilakukan kemudian setelah perbincaraan selesai dan memihak kepada responden.

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[25] Berlandaskan kepada prinsip undang-undang di atas, boleh diperhatikan bahawa mahkamah telah memberikan penekanan dan pertimbangan utama apabila melibatkan responden yang terlibat dalam siasatan kes jenayah apatah lagi yang sedang menghadapi pertuduhan jenayah seperti di dalam kes di hadapan mahkamah ini.

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[26] Responden sepatutnya telah sedia maklum bahawa pasportnya ditahan di mahkamah kerana mempunyai pertuduhan jenayah. Responden sepatutnya berurusan dengan syarikat di dalam negara yang tidak memerlukan responden meninggalkan Malaysia kerana peluang perniagaan yang dijalankan oleh syarikat responden masih ada dan boleh dibuat di dalam negara.

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[27] Mahkamah sepatutnya berwaspada dalam membenarkan permohonan pemohon untuk mendapatkan pasportnya untuk keluar negara atas urusan perniagaan. Sedangkan dalam keadaan di mana permohonan perlepasan passport atas sebab mendapatkan rawatan bagi kesihatan, mahkamah sangatlah berhati-hati dalam membenarkan permohonan sedemikian (rujuk kes *Public Prosecutor v Kamal Hisham bin Ja'afar* [2015] MLJU 1209 dan kes *Public Prosecutor v Dato' Sri Anwar bin Ibrahim* [1998] 4 AMR 3878.

I

- A** [28] Sehubungan dengan itu, berdasarkan afidavit sokongan responden, tujuan responden memohon untuk ke luar negara bukanlah sesuatu yang sangat dituntut untuk responden meneruskan kelangsungan hidup tetapi ianya merupakan pilihan responden sendiri yang boleh ditangguhkan selepas perbicaraan selesai.
- B** [29] Peguambela terpelajar responden menegaskan bahawa tiada sebarang bukti yang menunjukkan bahawa kewujudan responden sebagai 'flight risk'. Responden di dalam permohonan di mahkamah sesyen telah menyatakan kesediaan beliau untuk memberi aku janji di dalam afidavit-afidavitnya untuk memberikan rekod tempahan hotel di Singapura bagi simpanan rekod mahkamah untuk mengetahui lokasi keberadaan beliau di Singapura semasa urusan beliau dan pihak responden telah menghujahkan adalah logik dan wajar rekod tempahan ini diberikan selepas mahkamah membenarkan permohonan responden.
- C** [30] Menjadi perhatian mahkamah ini bahawa pada peringkat awalnya, mahkamah sesyen berpendapat bahawa wujudnya 'flight risk' di pihak responden maka passport responden ditahan dan atas alasan tersebut pergerakan responden perlu ada had dan batasnya. Maka beban di atas pihak responden untuk membuktikan bahawa tidak akan berlaku 'flight risk'.
- D** [31] Mahkamah ini perhatikan bahawa responden tidak memberikan sebarang maklumat atau butir-butir terperinci berkaitan tempat tinggal atau lokasi sepanjang tempoh beliau akan berada di Singapura. Besar kemungkinan responden berupaya untuk menghilangkan diri tanpa boleh dikesan amatlah tinggi. Sekiranya ini berlaku, ianya akan menyebabkan kes pihak pendakwaan tergendala, tidak boleh diteruskan tanpa kehadiran responden di mahkamah dan boleh mengakibatkan perbicaraan kes responden menjurus ke arah dilepaskan tanpa dibebaskan (DNAA).
- E** [32] Sehubungan dengan itu, amat tidak digalakkan passport antarabangsa responden dilepaskan untuk mengelak sebarang kebocoran dalam menegakkan keadilan terhadap pemohon dan juga kepentingan awam yang mana pertuduhan terhadap responden adalah kes yang melibatkan kehilangan hasil negara disebabkan tuntutan cukai pulang balik palsu.
- F** [33] Maka, berdasarkan kepada alasan-alasan di atas, mahkamah membenarkan permohonan semakan kehakiman ini dan perintah oleh HMS yang melepaskan passport responden diketepikan. Passport hendaklah dikembalikan kepada mahkamah untuk simpanan.
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PRELIMINARY OBJECTION

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- I** [9] In the present appeals before us, the respondent, on 9 October 2023 has filed a notice of preliminary objection via encl 11 premised on two grounds:
- (a) the appeal is incompetent; and
 - (b) the appeal has been rendered academic.

THE RELEVANT PROVISION OF LAW

A

[10] Section 50 of the Courts of Judicature Act 1964 provides as follows:

50 Jurisdiction to hear and determine criminal appeals

(1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of Criminal appeals the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court:

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(a) in the exercise of its original jurisdiction; and

(b) in the exercise of its appellate or revisionary jurisdiction in respect of any Criminal matter decided by the Sessions Court.

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(2) An appeal shall lie to the Court of Appeal with the leave of the Court of Appeal, against any decision of the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any Criminal matter decided by a Magistrate's Court but such appeal shall be confined to only questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision.

D

(2A) ...

(3) ...

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(4) ...

[11] Section 3 of the Courts of Judicature Act 1964 defines the word 'decision' as:

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decision means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause of matter which does not finally dispose of the rights of the parties.

OUR DECISIONS

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[12] We shall now consider the preliminary objection.

[13] The wording of s 3 of the Courts of Judicature Act 1964 are clear and unequivocal where the right of appeal against any decision of the court in respect of criminal matter does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties (see *Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd* [2003] 2 MLJ 495; [2003] 2 CLJ 177; *Mohamad Ridzuan bin Zamhor lwn Pendakwa Raya* [2018] 6 MLJ 606; [2018] 4 CLJ 315; [2018] 2 AMR 17).

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[14] The Court of Appeal in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [1999] 1 MLJ 321; [1999] 1 CLJ 537, where NH Chan JCA (as he then was) summed up the way in which the definition of 'decision' in s 3 of the

A Courts of Judicature Act 1964 is to be applied to a particular circumstance. The court at pp 329–335 (MLJ); pp 549–555 (CLJ) said:

B This new definition of ‘decision’, as in the amendment, does not include a judgment or order which does not deal with the final rights of the parties on the matters in dispute. In other words, what has been excluded from the meaning of the word ‘decision’ is the type of judgments and orders which is termed ‘interlocutory’ by *Halsbury’s Laws of England*, 4th Ed, Vol 26, para 506 at p 240, which reads:

C 506. Interlocutory judgments and orders. An order which does not deal with the final rights of the parties, but either (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after judgment, and merely directs how the declarations of right already given in the final judgment are to be worked out, is termed ‘interlocutory’. An interlocutory order, even though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals.

D Shortly stated, what the amendment means is that a judgment or order which does not deal with the final rights of the parties, but is made *pendente lite*, and gives no final decision on the matters in dispute, is not a ‘decision’ within the meaning of that word in the current version of s. 3 Courts of Judicature Act, and therefore is not appealable. It makes no difference that such a judgment or order is final, that is to say conclusive, as to the subordinate matter with which it deals.

E For instance, an order granting or refusing bail is final (conclusive) as to the application with which it deals but it is still an order which does not deal with the final rights of the parties. Such an order is made before judgment or sentence and gives no final decision on the matters in dispute. A judgment or order, even though not conclusive (final) of the main dispute, may be conclusive (final) as to the subordinate matter with which it deals. In this way, an interlocutory judgment or order may be conclusive (final) as to the subordinate matter with which it deals even though it is not conclusive (final) of the main dispute.

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G The real distinction is between, (for want of a better word) what is called final judgments and orders and interlocutory judgments and orders. In general, a judgment or order which determines the principal matter in question is termed ‘final’: see 26 *Halsbury’s Laws of England*, para 505, p 238. Actually, the use of the term ‘final’ is tautological as all judgments and orders are final. The term (‘final’) is used for the purpose of distinguishing between judgments and orders and ‘interlocutory’ judgments and orders. The difference is that judgments and orders which are not termed ‘interlocutory’ judgments and orders are appealable under the new meaning of the word ‘decision’ as defined in s 3 by the 1998 amendment. In other words, judgments and orders which determine the principal matter in question are termed ‘final’ judgments and orders, and they are appealable. But, those judgments and orders which give no final decision on the matters in dispute (which are termed ‘interlocutory’ judgments and orders) are now no longer appealable.

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So that the question in the instant appeal is: Is the order of the High Court as the court of first instance refusing bail appealable to the Court of Appeal in the present case? The answer will depend on whether the order refusing bail to the appellant is a ‘ruling made in the course of a trial or hearing of any cause or matter which does

not finally dispose of the rights of the parties. If the bail was refused during the process of the appellant's trial, then, it is not appealable as such refusal would not have the effect of finally determining his rights.

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A decision made pending the trial of the charges against the appellant is not, in our considered opinion, a decision (ruling) that had the effect of finally determining the rights of the appellant. It is only the outcome of the trial that would have the effect of finally disposing of his rights. A decision on bail (by the court of first instance), whether the grant or refusal of it, will not finally determine the rights of the appellant in the outcome of his trial. That being so, the order of the High Court in refusing to admit the appellant to bail was not appealable to the Court of Appeal.

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[15] Justice NH Chan JCA judgment was quoted with approval in *Ahmad Zubair @ Ahmad Zubir bin Hj Murshid v Public Prosecutor* [2014] 6 MLJ 831; [2014] 9 CLJ 289, where Raus Sharif PCA (as he then was), delivering the judgement of the court, stated as follows:

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[37] The position on the newly amended s 3 of the CJA has been clearly set out in the decision of this court in the case of *Dato Seri Anwar Ibrahim v Public Prosecutor* [2010] 9 CLJ 625 at p 636 where the court pointed out the underlying reasons for the amendment to the definition of 'decision' in s 3 of the CJA which came into effect on 31 July 1998 in the following manner:

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[24] The underlying reason behind the amendment to the definition of 'decision' in s 3 of the CJA is to stop parties from stalling a trial before the trial court by filing appeal after appeal on rulings made by the trial court in the course of a trial. Apart from that, the definition of 'decision' by itself is sufficiently clear and it is the court's duty to give effect to the same. Justice demands that cases should move without unnecessary interruption to their final conclusion.

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[38] From the above explanation given by this court in the case of *Dato Seri Anwar Ibrahim v PP* it is obvious that Parliament is not oblivious to appeals which tend to stall of *Dato Seri Anwar Ibrahim v Public Prosecutor* it is obvious that Parliament is not oblivious to appeals which tend to stall proceedings and delay speedy disposal of cases. The new definition of the word decision in the amended s 3 of the CJA which we have laid emphasis to in the preceding paragraph does not include a judgment, order or ruling which does not finally dispose of the rights of the parties on the matters in dispute. With the amended s 3 of the CJA, appeals filed based on technical rulings which are interlocutory in nature are now things of the past. Such appeals are incompetent to be laid before the appellate court as it is clearly precluded by law.

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[39] In this instant case the appellant had applied before the High Court to quash the charges and order an acquittal against him. The application was dismissed. The appellant had also applied before the sessions court for the charges to be quashed and prayed that a discharge not amounting to acquittal to be ordered against him. The application was also dismissed. The way we perceive it, the orders of the courts below would connote that the matter should proceed for trial as the charges preferred against the appellant still stand. Clearly the decision not to strike out the charges before the commencement of the trial as was done in this instant case does

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- A not amount to disposal of the rights of the parties. Since the order gives no final decision on the matters in dispute, it is not a ‘decision’ within the definition under s 3 of the CJA and therefore is not appealable.
- [40] It was for the above reasons we are hold that this appeal is on a matter which is incompetent to be laid before this court and was therefore struck out.
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- C [16] Guided by the above authorities, the order of the High Court to allow the prosecution’s application for review and further order to set aside the sessions court’s ruling that the appellant’s passport be temporary released, does not amount to disposal of rights of the parties. Clearly, the orders of the High Court are not ‘decision’ that has the effect of finally determining the rights of the appellant within the definition under s 3 of the Courts of Judicature Act 1964 and therefore is not appealable.
- D [17] Reverting back to the instant case, the application for temporary release of the passport is to enable the appellant to travel to Singapore on 13 July 2023–18 July 2023. When the notice of appeal was filed to the Court of Appeal on 8 July 2023, the appeal has become academic at the time the hearing came before us on 27 October 2023 by virtue of effluxion of time.
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- F [18] The respondent argued that the order sought by the appellant would be an exercise of futility as there is no longer any ‘live’ issue before this honourable court. Hence, there is no compelling justification for this honourable court to exercise its jurisdiction to hear the appeal on its merits.
- G [19] The respondent further contended that there was only a bare averment in the appellant’s affidavits that he would be travelling to Singapore on the given dates, without any flight itinerary or accommodation particulars attached. Failure to furnish such important particulars may not satisfy the court on possible concerns on flight risk. Even though, the appellant is presumed innocent until proven guilty, the fact remains that the appellant is facing not only serious but numerous charges involving huge amount of money for making false claims under the Goods and Services Tax Act 2014. On that score alone, the appeal should be struck out or dismissed in limine.
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- I [20] On the other hand, learned counsel for the appellant submitted at length to persuade us that the High Court sitting on appeal had fallen into error in dismissing the decision of the sessions court when he fail to consider the concept of the appellant business in feng shui where the appellant will be required to be at the location in person for professional consultation or advised. The ground for the application is set out in his affidavit in support affirmed on 28 March 2023 (encl 6 *RR* Vol 2 pp 7–13).

[21] Having considered the submissions and the authorities, we find that there are compelling justification for this honourable court to exercise its jurisdiction to hear the appeal on its merits. The court can use its own discretion to make such an order when it consider appropriate, perhaps in exceptional circumstances, bearing in mind the purpose or object behind the insertion of the newly amended s 3 of the Courts of Judicature Act 1964. We therefore find that the preliminary objection raised by respondent is without merits and accordingly, we dismiss the respondent's objection.

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[22] It is undeniable that the learned appeal judge had dealt extensively on the issue thoroughly to support his finding. Whilst we could not disagree with what the learned appeal judge had said in his judgment that with the help of modern technology, the appellant can be at his location without actually being in person at the site. With respect, we find that the learned judge had failed to sufficiently consider the significance concept of the appellant business in feng shui. The appellant as an expert adviser will have to be on-site survey to visualise, gather external surrounding information for a better engagement, advice, analysis, recommendations and to avoid any pitfalls as much as possible. Engagement in meeting with clients is vital in order to lay out strategic and development plan in bringing successful positive outcome for their clients.

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[23] We takes cognisance that the charges preferred against the appellant still stand. However, the appellant has never failed to appear in court for his ongoing criminal trial. We also recognised that the order sought by the appellant has gone stale.

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[24] Nonetheless, learned counsel for the appellant informed us that the appellant need to travel to Singapore from 1–5 November 2023 on a business trip. He then orally applied for the appellant passport to be temporarily released on the given dates and undertakes to returned the document a few days after the trip. Learned deputy, however objected to the appellant's application.

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[25] In this situation, all relevant factor, established legal principles as well as prevailing circumstances must properly be considered and evaluated to ensure fairness. In exercising its discretion judiciously, it is important for us to strike a balance between the risk of the appellant fleeing when he is still on trial facing criminal charges and his fundamental right under the Federal Constitution to the freedom of movement, liberty and presumption of innocence. Each case is to be decided on a case to case basis.

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[26] In balancing the rights of the applicant and the interest of the state, we wish to refer to the dictum of Gopal Sri Ram JCA (as he then was) in the case of *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631

A where His Lordship held:

[8] ... In our view, it is the duty of a court to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the Constitution. When light passes through a prism it reveals its constituent colours. In the same way, the prismatic interpretive approach will reveal to the court the rights submerged in the concepts employed by the several provisions under Part II. Indeed the prismatic interpretation of the Constitution gives life to abstract concepts such as 'life' and 'personal liberty' in art 5(1).

C [12] ... The effect of art 8(1) is to ensure that legislative, administrative and judicial action is objectively fair. It also houses within it the doctrine of proportionality which is the test to be used in determining whether any form of state action (Executive, Legislative, or Judicial) is arbitrary or excessive when it is asserted that a fundamental right is alleged to have been infringed.

D [27] And for ourselves, we are prepared to say that being a feng shui expert, who depend on his professional skill for his livelihood, he has a business duty to perform but these duties must not clash with the duty of court to proceed with the trial. Hence, to bar him now from leaving the country when he has shown to us valid and legitimate reason to be in Singapore for a feng shui business plan would be unfair to him. The ends of justice will not be met by preventing the appellant from leaving Malaysia at this stage. In addition, the respondent has not shown any evidence of him being a flight risk when he is out of the court's jurisdiction.

F [28] Having appraised ourselves of the relevant provision of the law, the documentary evidence before us, the oral and written submission made by the both parties, objectively and from all angles, we unanimously find that the learned High Court judge has not given sufficient judicial appreciation when exercising its revisionary jurisdiction that warrants appellate intervention. We therefore, set aside the decision of the learned High Court judge. The appeal is allowed subject to the following condition:

H (a) supporting documents such as flight itinerary or accommodation particulars must be submitted to the sessions court on or before 30 October 2023. Failure to furnish the required documents will result in refusal to regain temporary release of his passport; and

I (b) upon compliance with the above, the applicant international passport will then be released to the appellant on 30 October 2023. The passport will need to returned to the sessions court on or before 10 November 2023.

Order accordingly.

Reported by Ashok Kumar